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The Consolations of Linguistic Incomprehension: On the Disadvantages and Advantages of Interpreter-Mediated Communication in British Asylum Appeal Hearings

Interpretation in British Asylum Tribunals

It has become more difficult and consequently less common to claim asylum in the UK. Between 2002 and 2013 the number of asylum claims received plummeted from over 84,000 to 25,000¹ (Migration Observatory, 2015). The UK's truculence when it comes to recognising its international obligations to such people was vividly illustrated in 2015 by its rejection of a plan to share Syrian refugees across Europe in favour of a much more modest resettlement scheme. Between January 2014 and the end of September 2015 the UK resettled 252 Syrians in the face of an estimated 4.2 million fleeing violence (Gower 2015).

The toughening of the British system is partly due to the increasingly 'generalised' (Vaughan-Williams, 2009: 729) border controls that operate both extra-territorially such as in transit countries like France, resulting in the disturbing and chaotic scenes at Calais in the summer of 2015, in which migrants desperately tried to board lorries bound for the UK, and internally, enrolling actors as diverse as landlords, medical professionals and bank managers into the business of border control. Equally as restrictive, however, have been the legal innovations that have made the asylum determination process progressively less accessible and more incomprehensible to thousands of people every year (James and Killick 2010). A dizzying rate of legislative churn has combined with fixed-fee payments for legal aid funded asylum casework, which incentivises speedy law firms whilst discouraging conscientious preparation.

The disadvantages facing those who navigate this landscape without proficient English rest upon the fact that communication is mediated between the asylum seekers and a range of authority figures – such as the border officials, legal representatives and judges – through a third party, the interpreter, who the appellant relies upon to be professional and competent in their role. They also rely upon the adequate training of interpreters, sufficient resources being made available to find interpreters with suitable linguistic expertise, and, in the case of asylum appeal hearings in tribunals, reasonable provisions made by the court for the comfort of the interpreters themselves. These contingencies introduce the risk that communication is conducted imprecisely or erroneously at pivotal moments in the asylum applications including the appeal hearing: a risk that does not confront proficient English speakers. It is for these reasons that a lack of English language comprehension is usually viewed as a potential disadvantage for those navigating the asylum determination process in Britain. Indeed, incomprehension in the form of illiteracy, innumeracy or other limitations over the means to communicate is almost universally associated with marginality and deprivation in the social sciences. In contrast, commentators have neglected to explore the advantages that linguistic incomprehension might offer.

Between July 2013 and December 2014 three anthropologists and a geographer attended 390 asylum appeals, and were able to assess some of the advantages and disadvantages of interpreter-

¹ Main applicants.

mediated communication in the context of the asylum system². In the UK, most asylum applicants whose initial claims are refused can appeal the decision, which usually results in a tribunal hearing in front of an immigration judge. There are numerous hearing centres dotted around the country (see Figure 1), and we spent time in nine of these, keeping detailed ethnographic diaries, interviewing individuals involved in the hearings, and completing surveys. What surprised us, as we observed hearings where an interpreter was used³, were the advantages available to appellants who did not understand English, as well as to those who understood some English but still chose to use an interpreter. While by no means capable of fully compensating for the disadvantages that many appellants face, interpreters can – perhaps unintentionally – help to alleviate some of the discomforts of the appeal process.

The Perils of Interpreter-Mediated Hearings

We do not want to overstate the point. Anthropologists have recognised the myriad pitfalls of staging a legal appeal in a language in which the appellant is not proficient, even when an interpreter is provided. These pitfalls largely arise because interpretation, done well, is not simply a matter of mechanically matching words in one language with words in another. Although legal institutions, including the First Tier Tribunal (Immigration and Asylum Chamber), demand that interpreters do not intrude upon the meaning of exchanges (Gibb and Good, 2014), in practice this conception of interpreting is naive because there are many situations in which meaning will be lost via a verbatim translation (Rycroft, 2005). Effective interpreters will preserve as much of the meaning of the original as they can, which might involve them mimicking tone and emphasis as well as using a functional alternative where no direct equivalent word exists (Hale 2004). Interpretation, then, is as much an art as a science, which introduces the possibility of inconsistency.

As Gibb and Good (2014: 395) warn, '[d]ifferent interpreters, or the same interpreter on different occasions, may offer differing but equally valid [interpretations], creating, purely as an artefact of interpretation, the impression that the appellant is confused and possibly untruthful', which can have devastating consequences in a system that prizes credibility and consistency of accounts. Interpreters may also choose expressions and phrases on the basis of their personality or socially situated identity that can nullify the legal meaning of key words. In examining the barriers to disclosure of rape in asylum cases for instance, Baillot et al (2012) observed interpreters who 'deliberately tried to avoid using "this horrible word [rape]"', even where it may have been used by the appellant, because it was so aggressive' (Ibid: 286), instead opting for more ambiguous euphemisms such as 'they destroyed my respect' and 'my honour is tainted' (Ibid: 285).

² The overall aim of the project was broader than the assessment of interpretation. The objective was to assess the consistency of asylum appeals across different courts and hearings, and to determine what factors gave rise to any observed inconsistencies. The research team observed 100 cases ethnographically, 240 in mainstream asylum appeals with a survey that researchers completed whilst observing, and a further 50 in the Detained Fast Track, a system for expediting asylum appeals that has since been disbanded. Besides English, the researchers were not proficient in any of the languages spoken during the hearings and were usually therefore unable to capture or analyse the content or semantic dimensions of interpretations.

³ An interpreter was present in 82% of surveyed cases in the mainstream appeal system i.e. in 197 of the 240 cases we surveyed outside the Detained Fast Track.

Interpreters sometimes omit certain elements of what has been spoken in their interpretations, or change the tenor or degree of sarcasm implicit in a statement (Hale and Gibbons, 1999). This kind of 'gatekeeping' lends the interpreter considerable power to determine access to knowledge and modes of (self)representation during the institutional encounter (Davidson, 2001). Moreover, even without consciously choosing to do so, interpreters may alter the form in which questions are posed, with potentially significant legal consequences given that the art of a barrister precisely hinges upon the skilful elicitation of desired responses via carefully constructed questioning (Hale and Gibbons, 1999). All of these effects can be exacerbated the more inexperienced, overworked and pressured the interpreter, whereas well qualified, experienced and professionally ethical interpreters provided with appropriate working conditions (such as regular breaks) can do much to mitigate them by facilitating clear and effective communication.

We observed many examples of poor interpretation that served to validate these concerns. A Thai interpreter, for instance, told one of us that the criminal courts where she also provided interpretation services are a lot more stressful than the asylum Tribunal, because the work is more formal and serious - people might be sent to jail, so it's important not to make any mistakes - apparently overlooking the potentially dire consequences of an erroneous asylum decision. We also heard of appellants' reluctance to correct inaccurate translation when the interpreter is an elder or otherwise respected member of the community, and we witnessed at least one case where, in the absence of an available interpreter, the judge asked a family member with no relevant credentials to interpret for the appellant. Another of us observed an interpreter rush up to tell the Home Office Presenting Officer⁴ (HOPO) at the close of a hearing that the appellant was indeed lying by claiming to be from Iran when there could be no doubt, apparently, that they were actually Iraqi. In fact we saw numerous examples of interpreters overstepping their formal roles by offering their opinion to the judge on matters of information and even credibility: this happened in 6.7% of cases with an interpreter⁵.

Judges also often seemed ill-equipped to manage interpreters. Only 27% of judges required the interpreter and appellant to exchange a short dialogue to test their level of understanding at the beginning of a hearing, for example, even though this is outlined in best practice guidance for judges⁶. We also witnessed one judge refuse an unrepresented appellant's request for an adjournment for time to have documents translated, instead opting to ask the interpreter to give a rough translation in the courtroom, which was hardly likely to result in a comprehensive and considered rendition (and is also not legally accepted practice). Most concerning were the hearings involving what we call interpretation 'black outs': periods in which the interpreter failed – and was

⁴ The HOPO is the legal representative for the Home Office, though not required to be legally trained.

⁵ This refers to 6.7% of the 240 cases we surveyed in the mainstream appeal system that involved an interpreter, where the appellant was present, and which were not withdrawn or adjourned. It excludes cases we observed in the Detained Fast Track as well as our ethnographic cases. The precise question on the survey was 'At any point in the hearing does the interpreter overstep their role, such as giving their opinion to the immigration judge or providing evidence?'.

⁶ Includes only those cases that we surveyed that were not adjourned or withdrawn, and where both appellant and interpreter were present. The use of a short dialogue to test understanding is mentioned in 'Adjudicator Guidance Note: Pre Hearing Introduction,' Guidance Note No. 3, May 2002. Available: <https://www.judiciary.gov.uk/wp-content/uploads/2014/07/GuideNoteNo3.pdf> accessed 26th June 2015.

not reminded by the judge - to provide simultaneous interpretation of speech not directed at the appellant, most commonly the submissions of the legal parties. Such omissions were all the more serious when the appellant was unrepresented and was expected to respond to the HOPO's submissions which they had not been given the opportunity to 'hear'.

Many interpreters also faced significant intercultural barriers. For example, a Catholic Chinese appellant was asked "when Jesus was born did anyone come to see him?" The interpreter, who clearly had little knowledge of Christianity, said "I can't understand, he [the appellant] says something about gold". In another case, an interpreter not only made errors (using the word 'compass' rather than 'campus') which caused confusion, but was called up by the legal representative, who was also fluent in the appellant's language, for incorrect interpretation of 'ethnic group' as 'nationality'. The judge herself seemed unable to offer a remedy however, attempting unsuccessfully to explain to the interpreter what ethnic group meant, before eventually settling on the rather tautological definition of 'a group of people who share an ethnicity'.

Exacerbating the risks and shortcomings of interpretation are the contracting arrangements of interpreters. The Ministry of Justice has, since 2012, contracted the firm Capita to provide interpreters in asylum appeals. Such was the dissatisfaction when the contract was first awarded, that 60% of interpreters on the National Register of Public Service Interpreters (NRPSI) refused to work for them because of disputes over pay policy and the standard of qualifications required (Bowcott, 2012). Capita decided it would not require its interpreters to be registered with the NRPSI and would independently assess their competency (Henderson & Pickup, 2014: 34.2), which caused consternation among qualified interpreters. 'The Diploma in Public Service Interpretation was scrapped and now many people are not properly qualified' one interpreter complained. '[Capita] introduced its own rubbish exam' they continued, 'The exam is now one sheet of paper with 10 lines'. Another told us that, after the contract was awarded, Capita were 'providing anybody who spoke the language but didn't necessarily have the qualifications or the experience to work in the courts'.

Many of the interpreters that we spoke to expressed dissatisfaction with the contracting arrangements. Interpreters are expected to travel long distances and work for long periods of time without a break. Some also complained about the cut-backs within the Tribunal which has diminished the quality of their working environment. One Tamil interpreter, for example, complained that there were fewer facilities in the interpreters' room - not even a kettle or hangers to hang their coats. 'In some [centres] we used to have water facilities' another interpreter recalled, 'but those have been taken out... In some cases the clerks are very generous ... but I feel that as time is progressing this is getting thinner'. Furthermore, in contrast to other contexts such as the criminal courts and conference interpreting, interpreters working in the asylum Tribunal are not provided with any briefing in advance of the hearing from which to familiarise themselves with the terminology and concepts specific to the case. If interpreters are underpaid, underprepared, fatigued from continuous work and not provided with a suitable working environment the process of communicating through them is at risk of becoming unreliable - and potentially dangerous.

Solace in Adversity

We observed many instances in which interpreters appeared to actively attempt to assist the appellant. Some interpreters explicitly advised the appellants of the rules (stand up when the judge stands, for instance, or sit quietly during closing submissions) or told the appellant to slow down, speak up or answer the question when communicating. Interpreters often also added formal, courteous tones of address, such as interpreting the appellant's answer of 'yes' as 'that is correct, mam', which may have reduced the likelihood that the judge will be irked by the omission of signs of respect. In several cases the interpreter sought to comfort the appellant and, in one case, guided proceedings by encouraging the appellant, via gesticulating and eye contact, to insist on speaking up about being misquoted on the nature of his military service in Iran.

Professional codes of conduct and ethics for interpreters developed over the past decade (NRPSI, 2011; AUSTIT, 2012; ITI, 2013) emphasise the importance of maintaining independence and impartiality, not exercising power or influence over clients, not expressing an opinion or giving advice on any matter during an assignment, and interpreting faithfully and accurately both the content and intention of the dialogue (Hale 2004), without changing, adding or omitting anything. Such codes are intended to reduce the risk that interpreters will wield an inappropriate, invisible and unchecked degree of power over the client, the representation of the client, or the direction of the proceedings, and some of the attempts by interpreters to assist appellants threatened to increase this risk. Interpreters who do not carry out the role of neutral facilitators of communication may not only confuse appellants as to their capabilities, but also lose their professional credibility in the eyes of other actors. Appellants, as the disadvantaged parties who are dependent on interpreters, are often likely to lose out in such cases.

Yet we also observed ways in which the presence of the interpreter can benefit the appellant without these power dynamics. Interpreters can help to put particularly nervous or stressed appellants at ease, such as by undertaking small acts of courtesy like pouring a cup of water for them, or, in the case of an unrepresented appellant who had her young baby with her, assisting by holding the baby briefly during a break. These acts were 'minor' in the sense of occurring between, and separately from, the formal, 'major' happenings of the hearings themselves (Squire and Darling, 2013). They can be understood as 'quiet' (Askins, 2015), not in terms of volume, but in terms of their understated nature, centring around 'small acts [and] kind words' (Horton and Kraftl, 2009: 14) that modestly remind other parties in the hearing that the appellant is a person worthy of respect. The hearing may be one of the few times an appellant has spoken with someone of the same nationality, ethnicity, or dialect since arriving in the UK, and this too can help to put them more at ease. Moreover, by virtue of their mere presence and subtle actions taken in the course of hearings, interpreters can help to orient appellants in the midst of a bewildering process. Some employ discreet gestures, such as motioning to indicate who should speak next, which help to direct the appellant through the process. During one very fiery appeal, the judge was becoming frustrated that the young appellant kept forgetting to follow the instruction to make eye contact with the judge rather than the interpreter. The interpreter moved her chair slightly back in response, forcing the appellant to look at the judge rather than her⁷.

⁷ In some countries, such as Australia, formal guidance advises the interpreter to sit slightly further back than the client and avoid making eye contact with them in order to help foster the illusion of direct communication between the interlocutors (Pers. Comm).

The act of interpretation can also help to reduce the pressure placed on appellants by breaking up the intensity of some of the questioning and providing a buffer between those actors and the appellant. Although breaking down a narrative into small chunks and waiting until each chunk is interpreted before continuing can work against appellants by making them lose track of what they are saying (Gibb and Good, 2014), it can also help to diffuse highly charged situations, deflecting the emotion and accusation which characterise the cross-examination of many HOPOs⁸.

Interpretation also affords the appellant valuable time. One appellant, Aafa⁹, had been sick with worry before his asylum appeal, and his case had also been dropped shortly before the date of the hearing by his solicitor who judged that he had less than a 50% chance of winning, adding to his anxiety. To make matters worse, he could not understand his interpreter very well, since the interpreter, who spoke Farsi, did not have a good command of Dari, Aafa's first language. Yet despite having reasonably good English he decided to retain the interpreter and continue with interpretation during his hearing. 'Part of the benefit of the interpreter,' Aafa's adoptive mother explained, 'wasn't the fact that he needed interpretation so much at this stage because his English was pretty good, but it gave him more time to think. The judge would ask a question and the interpreter would interpret it and it just gave him a little bit more thinking time because obviously he was very, very nervous'.

Often appellants who speak English and do not require an interpreter still struggle to understand the specific terminology used or the often complex questions posed by the legal parties. Although this lack of understanding is often identified by the other parties in the hearing, particularly when the appellant asks for questions to be repeated, at other times it is not discerned or misinterpreted as evasiveness on the part of the appellant. The judge will also more directly instruct the appellant to speak up, slow down and speed up when there is no interpreter present, which can be disconcerting for the appellant. English-speaking appellants might also be expected to be more knowledgeable about the rules of the hearing than those with an interpreter since it is easy, although potentially erroneous, to assume that if they are proficient in English they have found it easier to become acquainted with the etiquette of the Tribunal.

Some of the worst treatment of appellants we observed occurred when no interpreter was present. 'She was the most unpleasant, rude and aggressive judge I have seen' one of our team wrote in a diary entry about an appellant in the Detained Fast Track process at Harmondsworth hearing centre¹⁰. After the HOPO had already rudely parroted the man when he mistakenly used the word 'uncomplete' the HOPO and judge appeared to dwell cruelly on the limits to his English comprehension. 'It feels as though the HOPO and judge are teasing the appellant' the entry continues, 'almost purposefully not understanding him. Judge screws up her face in a parody of incomprehension at his English, failing to understand almost everything she says, looking at others to translate things he says. He's speaking English and I can understand him perfectly! It feels incredibly rude to watch'. While it is difficult to speculate about whether this would have occurred were an interpreter present, we also found less extreme examples of greater respect afforded by judges to appellants with interpreters. Our findings yielded strong evidence that judges are more

⁸ Conversely, during hearings conducted exclusively in English, the judge will often ask the appellant to slow down to enable note-taking in any case, thus neutering the potential gain in narrative flow in the absence of an interpreter.

⁹ A pseudonym.

¹⁰ The DFT was suspended in July 2015 because a High Court judge found it to be unlawful.

likely to check that they are correctly pronouncing the name of the appellant when an interpreter is present¹¹ for instance, which denotes respect and is recommended by the Judicial College as one way to improve fairness¹².

Conclusion

Interpreters are necessary to the asylum system because they enable asylum applicants' accounts to be rendered into a linguistic form that is intelligible to the state. They are the intermediaries through which vulnerable migrants interact with institutions of the state (Davidson 2001). The use of an interpreter falls far short of a tool for direct, open opposition and resistance (Katz, 2004), and, in the case of role transgression, runs the risk of the appellant being further disempowered in the legal process. The complex, organic and fundamentally social nature of interpreting nevertheless offers – albeit minor – forms of resilience and solace for the appellant in their encounters with a hostile, monolithic system. The services offered by professional, qualified, ethical and appropriately remunerated and resourced interpreters constitute modest consolations for the structural injustices of border control.

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¹¹ Excludes the DFT cases we observed and the ethnographic data we observed. Calculation also excludes all withdrawn and adjourned cases, and refers only to cases when an appellant was present. Result statistically significant at 0.01 confidence threshold.

¹² In its handbook *Fairness in Hearing Centres and Tribunals*, the Judicial College (2012) suggest that in order to demonstrate fairness judges might "Ensure names and modes of address are correct by asking parties how they wish to be addressed" (Ibid 8).

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